

Dato' Seri Anwar bin Ibrahim v Perdana Menteri Malaysia & Anor A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01-164 OF 1998

ZULKEFLI, RAUS SHARIF AND HELILIAH MOHD YUSOF JJCA B
25 APRIL 2007

Civil Procedure — Originating summons — Declaration — Declaration against public authority — Whether suit correctly begun by originating summons — Whether suit ought to have been begun by way of judicial review — Rules of the High Court 1980 O 53 C

Constitutional Law — Executive — Dismissal of Minister — Revocation of appellant's appointment as Deputy Prime Minister and Minister of Finance by Prime Minister — Whether prior approval of Yang di-Pertuan Agong required — Whether dismissal valid — Federal Constitution art 43(5) D

The appellant was served with a letter, signed by the first respondent as Prime Minister, revoking the appellant's appointment as Deputy Prime Minister and Minister of Finance with immediate effect. The letter stated, inter alia, that the first respondent had informed the Yang di-Pertuan Agong of the appellant's dismissal. The appellant contended that the revocation of his appointment as a Cabinet Minister by the first respondent's was in contravention of art 43(5) of the Federal Constitution which provides that the appointment of any Minister may be revoked by the Yang di-Pertuan Agong, on the advice of the Prime Minister. Thus, the appellant contended, the revocation could not be effected by the first respondent without the prior assent of the Yang di-Pertuan Agong. The appellant sought, by originating summons, a declaration that his purported dismissal was in contravention of art 43(5) of the Federal Constitution and null and void and that he was still a Minister. Having entered appearance, the respondents sought to strike out the appellant's suit pursuant to O 18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 ('RHC'). The respondents contended that the Yang di-Pertuan Agong had assented to the appellant's dismissal, had signed an order to delete the appellant's name from the post of Deputy Prime Minister and had substituted the name of the first respondent in the column for the post of the Finance Minister. The trial judge allowed the respondent's application and struck out the suit. The appellant appealed. E
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Held, dismissing the appeal:

- (1) (per **Zulkefli JCA**) While the first respondent's letter did not indicate that it was written on the command of the Yang di-Pertuan Agong, it was more than sufficient for the first respondent to state that he had informed the Yang di-Pertuan Agong of the revocation. It was not wrong for the Prime Minister to state that he dismissed the appellant from the posts of Deputy Prime Minister and Minister of Finance (see para 3). I

- A (2) (per **Zulkefli JCA**) The format and the manner of a revocation of appointment is not provided for in law. There is also no provision that the revocation of the appointment of the appellant as a Cabinet Minister shall be communicated to the appellant personally by the Yang di-Pertuan Agong. The letter for the revocation of the appointment of the appellant which was handed to the
- B appellant stated that the Yang di-Pertuan Agong had been informed. It is a fair inference that, on or before the date of the letter, the decision and advice of the first respondent had been conveyed to the Yang di-Pertuan Agong and that the Yang di-Pertuan Agong had accepted the said decision and advice (see para 4).
- C (3) (per **Raus Sharif JCA**) Under the Federal Constitution, the Yang di-Pertuan Agong is a constitutional monarch who acts on ministerial advice and not on his own initiative. The power to dismiss a Minister is, in effect, with the Prime Minister. The Prime Minister can, at any time, advise the Yang di-Pertuan Agong to dismiss a Minister and the Yang di-Pertuan Agong is bound to act on such advice. No Minister can remain a member of the Cabinet where the
- D Prime Minister has decided that the Minister should be dismissed (see para 21); *Dato' Sri Anwar bin Ibrahim v Public Prosecutor* [2000] 2 MLJ 486 followed.
- E (4) (per **Raus Sharif JCA**) Bearing in mind that the appellant is asking the court to declare that he is still a Minister in the Cabinet, the appellant's case cannot be sustained. The relief sought by the appellant has become academic. Firstly, he is no longer a member of either House of Parliament. Secondly, the Parliament to which he was elected as a member of the House of Representative had been dissolved. To send the case sent back to the High Court would clearly be an exercise of futility (see para 21).
- F (5) (per **Raus Sharif JCA**) While the revocation letter, by itself, creates the impression that the formality of advising the Yang di-Pertuan Agong had not been undertaken by the first respondent, there is more than sufficient evidence to show that the formality had been observed. The affidavit evidence of the confidential secretary to the Yang di-Pertuan Agong clearly stated that the Yang
- G di-Pertuan Agong had accepted the Prime Minister's decision and the advice (see para 23).
- H (6) (per **Raus Sharif JCA**) The Chief Secretary to the Government, who was also then the Secretary to the Cabinet, stated that he had sought the Yang di-Pertuan Agong's assent to the Amendment Order 1998. It was in evidence that the Yang di-Pertuan Agong had assented to the Amendment Order 1998 which was subsequently gazetted. This was a clear indication that the Yang di-Pertuan Agong had accepted the advice of the first respondent to dismiss the appellant as a member of the Cabinet. Where one party makes such a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him the fact so asserted (see paras 23–24);
- I *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 287, *Alloy Automotive Sdn. Bhd. v Perusahaan Ironfield Sdn Bhd* [1980] 1 MLJ 382 and *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 referred.
- (7) (per **Heliliah Mohd Yusof JCA**) The Federal Constitution does not proscribe the actual procedures for the removal of a Minister. The court is in effect being

urged to look at the processes of decision making where illegalities are contended. The appellant argued that he had been engaged in lawful and gainful employment and that the employment had been terminated in a process that was legally questionable. But the appellant was not employed under a private contract nor by a statutory authority. The source of his appointment was in the domain of public law (see paras 35, 37); *O'Reilly v Mackman* [1983] 2 AC 237 and *Gabriel Peter & Partner v Wee Chong Jin* [1998] 1 SLR 374 referred.

- (8) (per **Heliliah Mohd Yusof JCA**) This suit raised public law issues as it challenged a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution. The legal sources of the powers that were being impugned were in the public domain. As such, the suit ought to have been instituted by way of O 53 of the RHC. To institute the proceedings by ordinary summons, though seemingly simple in procedure, deprived the public authority of the protections it was entitled to by the processes available under O 53 of the RHC. The suit, begun as it was by originating summons, was ill founded, an abuse of the processes of court and unsustainable (see paras 41, 43).

[Bahasa Malaysia summary]

Perayu telah diberikan sepucuk surat, yang ditandatangani oleh responden pertama sebagai Perdana Menteri, membatalkan pelantikan perayu sebagai Timbalan Perdana Menteri dan Menteri Kewangan dengan serta merta. Surat itu menyatakan, antara lain, bahawa responden pertama telah memaklumkan Yang di-Pertuan Agong tentang pemecatan perayu. Perayu berhujah bahawa pembatalan pelantikannya sebagai Menteri kabinet oleh responden pertama bertentangan dengan perkara 43(5) Perlembagaan Persekutuan yang memperuntukkan bahawa pelantikan mana-mana Menteri boleh dibatalkan oleh Yang di-Pertuan Agong, atas nasihat Perdana Menteri. Oleh itu, perayu berhujah, pembatalan itu tidak boleh dikuatkuasakan oleh responden pertama tanpa persetujuan Yang di-Pertuan Agong. Perayu memohon, melalui saman pemula, satu deklarasi bahawa pemecatannya adalah bertentangan dengan perkara 43(5) Perlembagaan Persekutuan dan terbatal dan tidak sah serta beliau masih seorang Menteri. Setelah memasukkan kehadiran, responden-responden memohon untuk membatalkan guaman perayu menurut A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Responden-responden berhujah bahawa Yang di-Pertuan Agong telah bersetuju dengan pemecatan perayu, telah menandatangani satu perintah untuk memotong nama perayu daripada jawatan Timbalan Perdana Menteri dan telah menggantikan nama responden pertama dalam ruang untuk jawatan Menteri Kewangan. Hakim perbicaraan telah membenarkan permohonan responden dan membatalkan guaman tersebut. Perayu telah mengemukakan rayuan.

Diputuskan, menolak rayuan tersebut:

- (1) (oleh **Zulkefli HMR**) Memandangkan surat responden pertama tidak menunjukkan bahawa ia ditulis atas perintah Yang di-Pertuan Agong, adalah

- A memadai untuk responden pertama menyatakan bahawa beliau telah memaklumkan Yang di-Pertuan Agong tentang pembatalan itu. Adalah tidak salah untuk Perdana Menteri menyatakan bahawa beliau telah memecat perayu daripada jawatan-jawatan Timbalan Perdana Menteri dan Menteri Kewangan (lihat perenggan 3).
- B (2) (oleh **Zulkefli HMR**) Format dan cara pembatalan suatu pelantikan tidak diperuntukkan dalam undang-undang. Tiada peruntukan juga agar pembatalan pelantikan perayu sebagai Menteri Kabinet patut dimaklumkan kepada perayu oleh Yang di-Pertuan Agong. Surat pembatalan Pelantikan perayu yang diserahkan kepada perayu menyatakan bahawa Yang di-Pertuan Agong telahpun dimaklumkan. Adalah inferens yang adil bahawa, pada atau sebelum tarikh surat itu, keputusan dan nasihat responden pertama telah disampaikan kepada Yang di-Pertuan Agong dan bahawa Yang di-Pertuan Agong telah menerima keputusan dan nasihat tersebut (lihat perenggan 4).
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- D (3) (oleh **Raus Sharif HMR**) Di bawah Perlembagaan Persekutuan, Yang di-Pertuan Agong adalah raja berperlembagaan yang bertindak atas nasihat menteri dan bukan atas inisiatif sendiri. Kuasa untuk memecat seorang Menteri adalah, Perdana Menteri. Perdana Menteri boleh, pada bila-bila masa, nasihat Yang di-Pertuan Agong untuk memecat seorang Menteri dan Yang di-Pertuan Agong adalah terikat untuk bertindak atas nasihat itu.
- E Tiada Menteri boleh kekal sebagai ahli Kabinet di mana Perdana Menteri telah memutuskan bahawa Menteri itu patut dipecat (lihat perenggan 21); *Dato' Sri Anwar bin Ibrahim v Public Prosecutor* [2000] 2 MLJ 486 diikuti.
- F (4) (oleh **Raus Sharif HMR**) Dengan mengambilkira bahawa perayu memohon mahkamah untuk mengisytiharkan bahawa beliau masih seorang Menteri dalam Kabinet, ke perayu tidak boleh dikekalkan. Relief yang dipohon oleh perayu telah menjadi akademik. Pertamanya, beliau bukan lagi ahli mana-mana Dewan Parlimen. Keduanya, Parlimen yang mana beliau telah diundi sebagai ahli Dewan Rakyat telah dibubarkan. Untuk menghantar balik kes tersebut ke Mahkamah Tinggi dengan jelas suatu yang sia-sia (lihat perenggan 21).
- G (5) (oleh **Raus Sharif HMR**) Meskipun surat pembatalan itu dengan sendirinya memberikan tanggapan bahawa formaliti menasihati Yang di-Pertuan Agong tidak dilaksanakan oleh responden pertama, terdapat keterangan yang lebih daripada memadai untuk menunjukkan bahawa formaliti itu dilakukan. Afidavit keterangan setiausaha sulit kepada Yang di-Pertuan Agong dengan jelas menyatakan bahawa Yang di-Pertuan Agong menerima keputusan dan nasihat Perdana Menteri (lihat perenggan 23).
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- I (6) (oleh **Raus Sharif HMR**) Ketua Setiausaha kepada Kerajaan, yang juga Setiausaha kepada Kabinet pada masa itu, menyatakan bahawa beliau telah memohon persetujuan Yang di-Pertuan Agong berhubung Perintah Pindaan 1998. Terdapat dalam keterangan bahawa Yang di-Pertuan Agong telah menerima nasihat responden pertama untuk memecat perayu sebagai ahli Kabinet. Di mana satu pihak membuat penegasan positif berhubung isu penting, kegagalan lawannya untuk menentang biasanya dianggap sebagai pengakuan oleh beliau tentang fakta yang dinyatakan (lihat perenggan 23–24);

Ng Hee Thoong v Public Bank Bhd [1995] 1 MLJ 287, *Alloy Automotive Sdn. Bhd. v Perusahaan Ironfield Sdn Bhd* [1980] 1 MLJ 382 dan *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332 dirujuk.

- (7) (oleh **Heliliah Mohd Yusof HMR**) Perlembagaan Persekutuan tidak melarang prosedur sebenar untuk pemecatan seorang Menteri. Mahkamah sewajarnya didorong untuk melihat proses-proses membuat keputusan di mana kepenyalahan undang-undang dihujah. Perayu berhujah bahawa beliau telah diambil bekerja secara sah dan yang menguntungkan dan bahawa pekerjaan itu telah ditamatkan dalam suatu proses yang mana kesahannya dipersoalkan. Namun perayu tidak diambil bekerja di bawah satu kontrak peibadi maupun oleh sebuah badan berkuasa statutori. Sumber pelantikannya adalah dalam ruang lingkup undang-undang awam (lihat perenggan 35, 37); *O'Reilly v Mackman* [1983] 2 AC 237 dan *Gabriel Peter & Partner v Wee Chong Jin* [1998] 1 SLR 374 dirujuk.

- (8) (oleh **Heliliah Mohd Yusof HMR**) Guaman ini menimbulkan isu-isu undang-undang awam kerana ia mencabar suatu keputusan dan tindakan yang diambil oleh Perdana Menteri menurut peruntukan Perlembagaan Persekutuan. Sumber sah kuasa yang dipersoalkan adalah dalam bidang awam. Oleh itu, guaman patut dimulakan melalui A 53 KMT. Untuk memulakan prosiding melalui saman biasa, meskipun nampak senang prosedurnya, tidak memberikan pihak berkuasa awam perlindungan yang sepatutnya oleh sebab proses-proses yang sedia ada di bawah A 53 KMT. Guaman tersebut, yang bermula melalui saman pemula, adalah tidak betul, satu penyalahgunaan proses-proses mahkamah dan tidak boleh dikekalkan (lihat perenggan 41, 43).]

Notes

For a case on dismissal of Minister, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1735.

For cases on declaration, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index paras 4346–4349.

Cases referred to

Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd [1980] 1 MLJ 382 (refd)
Bandar Builder Sdn Bhd Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36 (refd)

Dato' Sri Anwar bin Ibrahim v Public Prosecutor [2000] 2 MLJ 486 (folld)

Gabriel Peter & Partner v Wee Chong Jin [1998] 1 SLR 374 (refd)

Ng Hee Thoong v Public Bank Bhd [1995] 1 MLJ 287 (refd)

O'Reilly v Mackman [1983] 2 AC 237 (refd)

Overseas Investment Pte Ltd v Anthony William O'Brien & Anor [1988] 3 MLJ 332 (refd)

Punton v Ministry of Pensions and Natural Insurance [1963] 1 All ER 275 (refd)

R v Entry Clearance Officer, Bombay, Ex p Amin [1983] 2 AC 818 (refd)

Sim Kie Chon v Superintendent of Pudu Prison & Ors [1985] 2 MLJ 363 (refd)

Legislation referred to

Courts of Judicature Act 1964

Federal Constitution arts 5(1), 43(5)

- A Rules of the High Court 1980 O 7, O 15 r 16, O 18 r 19(1)(a), (b), (d), O 53
Rules of the High Court (Amendment) 2000 O 53

Appeal from: Originating Summons No S5–21–185 of 1998 (High Court, Kuala Lumpur)

B *Karpal Singh (Karpal Singh & Co) for the appellant.*
Asmabi bte Mohamad (Senior Federal Counsel, Attorney-General's Chambers) for the respondent.

C **Zulkefli JCA:**

D [1] I have read the judgment in draft of my learned brother Raus Sharif JCA. I agree with the views expressed and the orders made by his lordship in dismissing this appeal by the appellant. It is my respectful view the learned judge of the High Court was right in construing that the letter of revocation dated 2 September 1998 by the first respondent has satisfied the requirement of art 43(5) of the Federal Constitution. I would like to add in a few words in support of the judgment of my learned brother, Raus Sharif JCA as follows.

E [2] To my mind the issue to be decided in this appeal is quite straightforward. The starting point of the complaint by the appellant is that the letter of revocation dated 2 September 1998 from the first respondent revoking the appellant's appointment as a Cabinet Minister was in contravention of art 43(5) of the Federal Constitution. By particular reference to the third paragraph of the said letter which reads, 'Perlucutan ini telah dimaklumkan kepada Seri Paduka Yang di-Pertuan Agong', the appellant contended that the said revocation was effected by the first respondent without having a prior assent of the Yang di-Pertuan Agong.

G [3] With respect, I cannot agree with the appellant's contention. Although there is nothing in the first respondent's letter to indicate that the letter was written on the command of the Yang di-Pertuan Agong, in my view it would be more than sufficient for the first respondent to have stated that he had informed the Yang di-Pertuan Agong about the revocation. As rightly stated by my learned brother, Raus Sharif, JCA in his judgment that under the scheme of our Federal Constitution the power to dismiss any Minister is in effect with the Prime Minister. He can at any time advise the Yang di-Pertuan Agong to dismiss any Minister and the Yang di-Pertuan Agong as a constitutional monarch is bound to act on the advice of the Prime Minister. Therefore, in my view there is nothing wrong for the first respondent as the Prime Minister to have stated in the said letter dated 2 September 1998 that with regret he had to dismiss the appellant from holding the posts of Deputy Prime Minister and Minister of Finance as well as other posts in the Government held by the appellant as Deputy Prime Minister and Minister of Finance.

I [4] It has also to be stated here that the format and the manner on how a revocation of the appointment of a Cabinet Minister is to be effected is not provided in the law.

There is also no provision in the law that the revocation of the appointment of the appellant as a Cabinet Minister shall be communicated to the appellant personally by the Yang di-Pertuan Agong. The letter for the revocation of the appointment of the appellant which was handed to the appellant stated that the Yang di-Pertuan Agong had been informed. It is my view by this statement from the first respondent it would be a fair inference to make a finding that in fact on or before 2 September 1998 the decision and the advice of the first respondent had already been conveyed to the Yang di-Pertuan Agong and that the Yang di-Pertuan Agong had accepted the said decision and advice.

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[5] The case for the respondents is further fortified by the affidavit evidence of Hj Ja'afar bin Wahab who was then the Confidential Secretary to the Yang di-Pertuan Agong, affirming that the Yang di-Pertuan Agong had informed him of the decision and the advice of the first respondent to revoke the appellant's appointment as a Minister and his Majesty had duly accepted the said decision and advice of the first respondent. On this material point it is to be noted that the appellant did not at all challenge the said evidence from the Confidential Secretary to the Yang di-Pertuan Agong. Accordingly, I would dismiss the appeal.

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Raus Sharif JCA:

[6] This is an appeal against the decision of the High Court, Kuala Lumpur, delivered on 24 December 1998, in allowing the respondents' application to strike out with costs the appellant's originating summons and the affidavit in support, pursuant to O 18 r 19(a), (b) and (d) of the Rules of the High Court 1980 ('RHC').

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[7] We heard the appeal on 26 February 2007 and at the conclusion of the hearing we reserved our decision.

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[8] The relevant facts of this case are these. The appellant was appointed as the Deputy Prime Minister and also the Minister of Finance after the 1995 general election. On 2 September 1998, the appellant was served with a letter ('letter of revocation') from the Prime Minister ('first respondent') stating that his appointment as the Deputy Prime Minister and Ministry of Finance was revoked with immediate effect. The letter of revocation reads as follows:

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Yang Berhormat Dato' Seri Anwar bin Ibrahim

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Yang Berhormat Dato',

Dengan dukacitanya saya terpaksa melucutkan jawatan-jawatan Timbalan Perdana Menteri dan Menteri Kewangan daripada Dato' Seri serta lain-lain jawatan dalam Kerajaan yang dipegang oleh Dato' Seri sebagai Timbalan Perdana Menteri dan Menteri Kewangan.

Perlucutan ini berkuatkuasa dari hah ini, 2 September 1998 mulai jam 5.30 petang. Perlucutan ini telah dimaklumkan kepada Seri Paduka Baginda Yang di Pertuan Agong.

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A Salam hormat.

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Dr Mahathir bin Mohamad

2 September 1998.

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C [9] Premised on the letter of revocation, the appellant contended that the first respondent had unlawfully revoked his appointment as a Cabinet Minister. According to the appellant the revocation of his appointment was in contravention of art 43(5) of the Federal Constitution. The reason is because the wordings of the letter of revocation that 'Perlucutan ini telah dimaklumkan kepada Seri Paduka Baginda Yang di-Pertuan Agong' runs in the face of the clear wordings of art 43(5) which provides that the appointment of any Minister shall be revoked by the Yang di-Pertuan Agong on the advice of the Prime Minister. In other words, the appellant is contending that the revocation must be effected by the Yang di-Pertuan Agong acting on the advice of the first respondent. It cannot be effected by the first respondent without having a prior assent of the Yang di-Pertuan Agong.

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E [10] Hence, the appellant in his originating summons sought for the following relief:

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(a) a declaration that the first respondent had acted in contravention of the provision of art 43(5) of the Federal Constitution when purporting to dismiss the appellant from the Malaysian Cabinet;

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(b) a declaration that the appellant's dismissal as Minister in the Malaysian Cabinet by the first respondent from 5.30pm 2 September 1998 is null and void, inconsequential and of no effect;

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(c) a declaration that the appellant is still a Minister in the Malaysian Cabinet; and
(d) costs and other relief deem fit and proper.

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H [11] After having entered appearance, the respondents then filed an application pursuant to O 18 r 19(1)(a), (b) and (d) of the RHC to strike out the appellant's originating summons and affidavit in support on the grounds that the pleadings disclose no reasonable cause of action and that the pleadings are scandalous, frivolous, vexatious and an abuse of the process of the court. The respondents' application was premised on the grounds that

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(a) the Yang di Pertuan Agong had given His Majesty assent to the appellant's dismissal;

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(b) the Yang di Pertuan Agong had made the Ministers of the Federal Government (Amendment) Order 1998, ('Amendment Order 1998') to delete the name of the appellant from the post of Deputy Prime Minister and had substituted that column with the name of the 1 respondent for the post of the Finance Minister; and (c) this is a clear and obvious case for the Court to strike out the appellant's originating summons and the affidavit in support.

[12] The respondents' application was supported by the affidavits of Tan Sri Abd Halim bin Ali ('Tan Sri Halim') affirmed on 20 November 1998 and Hj Ja'apar bin Wahab ('Hj Ja'apar') affirmed on 25 November 1998. Hj Ja'apar was then the Confidential Secretary to the Yang di-Pertuan Agong. In his affidavit, Hj Ja'apar stated that the Yang di-Pertuan Agong had informed him of the decision and the advice of the first respondent to revoke the appellant's appointment as a Minister and His Majesty had accepted the decision and advice of the first respondent. Hj. Ja'apar further stated that on 5 September 1998, he was informed by Yang di-Pertuan Agong that His Majesty had given His Majesty's assent to the Amendment Order 1998 which in effect had deleted the appellant's name from the relevant column in the Amendment Order 1998 and had substituted the column with that of the first respondent.

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[13] Tan Sri Halim, who was then the Chief Secretary to the Government, in his affidavit stated that on 4 September 1998 he had handed the Amendment Order 1998 to Datuk Pengelola Bijaya Diraja at the Istana Negara to seek His Majesty's assent to the Amendment Order 1998. According to him, the Amendment Order 1998 was returned to him on 5 September 1998 after being assented to by the Yang di-Pertuan Agong. On 7 September 1998, Tan Sri Halim, who was also then the Secretary to the Cabinet signed the Amendment Order 1998 and had it gazetted on the same day. The Amendment Order 1998 date of operation was backdated to 3 September 1998.

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[14] The learned judge agreed with the respondents. According to the learned judge, the letter of revocation by the first respondent, has satisfied the requirement of art 43(5) of the Federal Constitution. The learned judge said it in the following words:

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It is true that there is nothing in PM's letter to show that the letter was written at the behest of the King. Nevertheless as the King was advised and informed about the decision (keputusan) as evidenced by para 4 and 5 of the affidavit (encl 10) of the private secretary, such omission, in my view, is of no consequence. A fortiori, the aforesaid affidavit evidences lend support to the averment in PM's letter in that he (PM) had informed the King about the revocation. Looking at undisputed facts objectively, in substance although not in form, in my judgment, the letter of revocation, has satisfied the requirement of art 43(5).

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[15] Before us, En Karpal Singh, learned counsel for the appellant, submitted that the learned judge had seriously misdirected himself in fact and in law when concluding that the appellant's case discloses no reasonable cause of action and was obviously unsustainable. According to En Karpal the appellant's case was not one which was plain and obviously unsustainable meriting recourse to the summary process of striking out. He submitted that the letter of revocation by itself had raised a serious question to be tried iewhether prior assent of the Yang di-Pertuan Agong had been obtained when the letter of revocation was sent to the appellant.

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[16] Senior Federal Counsel, Puan Asmabi bte Mohamad submitted otherwise. In essence, the senior federal counsel, repeated the same argument advanced before the learned judge, in that the appellant's case was obviously unsustainable.

A [17] The principle governing O 18 r 19 of the RHC is well settle. The Federal Court in *Sim Kie Chon v Superintendent of Pudu Prison & Ors* [1985] 2 MLJ 363 at p 386 held:

B The principle governing the striking out of pleadings is clear in that it is only in plain and obvious cases that recourse should be had to the summary process under O 18 r 19 of the Rules of the High Court 1980: 'the summary procedure under this rule can only be adopted when it can clearly be seen that a claim or answer is on the face of it 'obviously unsustainable'.

C [18] The above view was repeated by the Federal Court in *Bandar Builder Sdn Bhd Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 at p 43:

D The principles upon which the courts act in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'.

The Federal Court further stated at the same page:

The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

E [19] Thus, the main issue before us is whether the appellant's claim is obviously unsustainable. In order to do so, it is necessary to examine the provisions of the Federal Constitution, in relation to the appointment and revocation of Cabinet Ministers. It is found in art 43. The relevant provisions reads:

F 43(1)The Yang di Pertuan Agong shall appoint a Jemaah Menteri (Cabinet of Ministers) to advise him in exercise of his function.

(2) The Cabinet shall be appointed as follows, that is to say:

G (a) the Yang di Pertuan Agong shall first appoint as Perdana Menteri (Prime Minister) to preside over the Cabinet a member of the House of Representative who in his judgment is likely to command the confidence of the majority of the members of that House; and

(b) he shall on the advice of the Prime Minister appoint other Menteri (Ministers) from among the members of either House of Parliament.

H (5) Subject to Clause (4), Minister other than the Prime Minister shall hold office during the pleasure of the Yang di Pertuan Agong, unless the appointment of any Minister shall have been revoked by Yang di-Pertuan Agong on the advice of the Prime Minister but any Minister may resign his office.

I [20] The working of art 43(5) was considered by this court in *Dato' Sri Anwar bin Ibrahim v Public Prosecutor* [2000] 2 MLJ 486. Lamin PCA (as he then was) speaking for the Court of Appeal said:

Under the above provisions, a Minister other than the Prime Minister holds office at the pleasure of the Prime Minister. In actual terms, he holds office at the pleasure of the Prime

Minister. This means that the Prime Minister may revoke his appointment at any time. Of course formality demands that the revocation of his appointment shall be acted upon by the Yang di Pertuan Agong 'on the advice of the Prime Minister'. The Yang di Pertuan Agong must act on such advice.

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[21] With respect, I shared the same view. Under the scheme of our Federal Constitution, the Yang di-Pertuan Agong is a constitutional monarch who acts on ministerial advice and not on his own initiative. The power to dismiss any Minister is in effect with the Prime Minister. He can at any time advise the Yang di Pertuan Agong to dismiss any Minister and His Majesty is bound to act to the advice of the Prime Minister. In short, no Minister can remain as a member of the Cabinet if the Prime Minister decided that he should be dismissed. Hence, with the law as it stands, I cannot see how the appellant's case can be sustained bearing in mind that he was asking the court to declare that he is still a Minister in the Cabinet. In fact, the relief sought by the appellant had become academic. Firstly, he is no longer a member of either House of Parliament. Secondly, the Parliament on which he was elected as a member of the House of Representative had been dissolved. Thus, to accede to Mr Karpal submission that the case should be sent back to the High Court to have it tried, would clearly be an exercise of futility.

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[22] Mr Karpal concede that the court can no longer declare that the appellant is still a Minister in the Cabinet. However, he argued that, if a full trial is ordered and if the appellant succeeded in proving his case, the appellant should be entitled to damages. Mr Karpal main reason why a full trial should be ordered in this case is because the letter of revocation in itself had created a serious doubt whether the 1 respondent had in fact advised the Yang di-Pertuan Agong on revocation of the appellant as a Cabinet Minister.

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[23] My respectful view is that the revocation letter by itself to a certain extent had created an impression that the formality of advising the Yang di-Pertuan Agong was not done by the first respondent. However looking at the affidavits filed in support of the respondents' application, there is more than sufficient evidence to show that the formality was done. We have the affidavit evidence of Hj Ja'apar who had affirmed that the Yang di-Pertuan Agong had accepted the decision and the advice of the first respondent pertaining to the revocation of the appellant. The appellant did not contradict the said evidence. It is well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him the fact so asserted (see *Ng Hee Thoong v Public Bank Bhd* [1995] 1 MLJ 287, *Alloy Automotive Sdn Bhd v Perusahaan Ironfield Sdn Bhd* [1980] 1 MLJ 382; *Overseas Investment Pte Ltd v Anthony William O'Brien & Anor* [1988] 3 MLJ 332).

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[24] We also have an affidavit evidence of Tan Sri Halim, stating that the Yang di-Pertuan Agong had assented the Amendment Order 1998 on 5 September 1998 which was subsequently gazetted on 7 September 1998. To me, the assenting of the Amendment Order 1998 by the Yang di-Pertuan Agong was a clear indication that His Majesty had accepted the advice (which His Majesty cannot refuse) of the first respondent to dismiss the appellant as a member of the Cabinet.

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A [25] In view of the foregoing, I see no justification in ordering a full trial of this case. Firstly, the relief sought by the appellant had become academic. Secondly, there is no triable issue to be tried. The appeal is dismissed with costs.

Heliliah Mohd Yusof JCA:

B [26] The analysis of facts and arguments in this appeal as contained in the judgement of my learned brother Raus Sharif JCA which I have read in draft relieves me of the labour of repeating the background of the case. While I am not differing from my learned brothers in arriving at a conclusion that the suit is not sustainable I wish to proffer different observations which are the following.

C [27] The appellant's claim for a declaration was filed pursuant to O 7 and O 15 r 16 of the Rules of the High Court 1980 ('RHC'). It is also noted that the respondent has in filing an originating summons to strike out the claim invoked O 18 rr 19(1)(a), (b) and (d). The trial judge has ruled in favour of the respondents by granting order in terms namely that the appellant's claim was to be struck out on the ground that it discloses no reasonable cause of action, that it is scandalous, frivolous or vexatious or that it is otherwise an abuse of the process of the court.

D [28] In his judgement the learned judge made the following finding, inter alia — 'it is glaring to me that plaintiff's case discloses no reasonable cause of action and is obviously unsustainable'.

E [29] Such use of words would invite one to infer that the appellant's claim to the declaratory relief would fall only under O 18 r 19(1)(a) but as mentioned above judgement was entered on the basis that the claim fell by virtue of paragraphs (a), (b) and (d).

F [30] The Memorandum of Appeal has listed seven grounds but it could be simply be summarised as follows:

- G (a) the appellant's claim was not one which was plain and obviously unsustainable meriting recourse to the summary process of striking out.
- H (b) there was an alleged miscarriage of justice as the appellant had been deprived off his livelihood and the revocation of the appellant's appointment as Minister of Finance and as Deputy Prime Minister had been effected through a process that was not in consonance with the provisions of art 43(5) of the Federal Constitution.

I [31] I find it necessary to encapsulate the above as the relief that is sought is a discretionary remedy in the form of a declaratory judgment. As the learned counsel for the appellant Mr Karpal had conceded it was far too late in the day to consider a form of reinstatement but he had mentioned the question of damages.

[32] The pertinent question here was whether the learned trial judge had exercised his discretion properly for it is averred that he had misdirected himself in fact and in

law in striking out the appellant's suit in limine. It has to be reiterated that the learned High Court judge had to address a suit filed for a declaratory relief through the originating summons procedure. In *Punton v Ministry of Pensions and Natural Insurance* [1963] 1 All ER 275 at p 278, Lord Denning had observed that an originating summons still remains a sensible and modern way of approach 'for obtaining a declaration'. The appellant has filed an affidavit in support of his originating summons. The thrust of the suit is the challenge to the validity of the processes by which his appointments as Minister of Finance as well as to the post of Deputy Prime Minister have been terminated and where it is averred that it has been done by the first respondent in contravention of the provision of art 43(5) of the Federal Constitution. The gist of the contention is that it is His Majesty the Yang Di-Pertuan Agong and not the first defendant who has the authority or right to terminate the appointment of the appellant as Minister.

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[33] Learned counsel for the appellant has averred that in losing his office it has caused him to lose his means of livelihood and has thus attracted the provisions of art 5(1) of the Federal Constitution. However the decision to terminate his services as a member of the administration is the decision of a public authority acting in accordance with the Federal Constitution and deriving authority from the Federal Constitution.

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[34] The whole process being questioned is not that the Prime Minister does not have the power to dismiss but that he could only do so upon compliance and observation of certain procedures which in the circumstances of the present case as contended by learned counsel for the appellant, it must be shown that His Majesty the Yang di-Pertuan Agong was properly advised. Learned counsel for the appellant has contended that the very contents of the affidavits filed in support of the application to strike out by themselves show that there are merits for the suit to be adjudicated at a full trial. Nevertheless it still remains the case that what has been resorted to is a procedure under O 7 of the RHC and for an order under O 15 r 16 of the RHC.

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[35] The draft judgements of both my learned brothers, Zulkefli and Raus Sharif JICA that I have the opportunity to peruse have indicated that the Federal Constitution does not proscribe (sic) the actual procedures for the removal of a Minister. The repeated arguments of the learned counsel of for the appellants on the issue of the legality of the process of termination of a Ministerial appointment and the repeated submission of the learned senior federal counsel that the action is not sustainable amply demonstrate, that in this appeal, there is warranted an occasion to cite the views of Lord Diplock in *O'Reilly v Mackman* [1983] 2 AC 237. The reason that I have found compelling is that the court is in effect being urged to look at the processes of decision making where illegalities are contended.

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[36] By virtue of the Rules of the High Court (Amendment) 2000 vide PU (A) 342/2000 published 21 September 2000 a new O 53 replaced the former O 53. The new O 53 makes explicit reference to paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purposes therein. The said schedule (paragraph 1) prescribes, inter alia, that the power of the High Court under that paragraph

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A includes, inter alia, the power to issue to any.... or authority directions., order or writs including writs of the nature... of....or any others for the enforcements of the rights conferred by Part II of the Constitution, or any of them, or for any purpose. The new O 53 may not be in all respects in pari materia with the amendments in England.

B [37] It is the submission of the learned counsel that the appellant has been engaged in lawful and gainful employment and that the employment has been terminated in a process that is legally questionable. But the appellant is not employed under a private contract nor by a statutory authority. The source of his appointment is in the domain of public law that is the Federal Constitution. Hence my reasons for the
C compelling need to refer to certain passages in the not uncriticised decision of *O'Reilly v Mackman* the relevant parts of which is at pp 284–285 (per Lord Diplock):

My Lords, O 53 does not expressly provide that procedure by application for judicial review shall be the exclusive procedure available by which the remedy of a declaration or injunction may be obtained for infringement of rights that are entitled to protection under public law;
D There is great variation between individual cases that fall within O 53 and the Rules Committee and subsequently the legislature were, I think, for this reason content to rely upon the express and the inherent power of the High Court, exercised upon a case to case basis, to prevent abuse of its process whatever might be the form taken by that abuse. Accordingly, I do not think that your Lordships would be wise to use this as an occasion to lay down categories of cases in which it would necessarily always be an abuse to seek in
E an action begun by writ or originating summons a remedy against infringement of rights of the individual that are entitled to protection in public law.

The position of applicants for judicial review has been drastically ameliorated by the new O 53. It has removed all those disadvantages, particularly in relation to discovery, that were manifestly unfair to them and had, in many cases, made applications for prerogative orders
F an inadequate remedy if justice was to be done. This it was that justified the courts in not treating as an abuse of their powers resort to an alternative procedure by way of action for a declaration or injunction (not then obtainable on an application under O 53), despite the fact that this procedure had the effect of depriving the defendants of the protection to statutory tribunals and public authorities for which for public policy reasons O 53 provided.

G [38] It is to be noted that the submission of the learned senior federal counsel is somewhat scant on the issue of the abuse of process. It is not a question here of the appellant not being able to have access to the court but a question what procedure should be adopted. The requirement for O 53 to be utilised is predicated on the
H following:

- (a) the challenge is on public law where the validity of a public authority's act or omission is being questioned and
- (b) the appellant is not seeking to enforce a completely constituted private law right but his right of employment as a Minister.

I [39] In the only case cited by the learned senior federal counsel that is *Gabriel Peter & Partner v Wee Chong Jin* [1998] 1 SLR 374, Young Pung How CJ (as he then was) stated, inter alia, while considering the principles for striking out an action as follows (at p 384 para 22):

The term 'abuse of the process of the court in O 18 r 19 (1) (d) has been given a wide interpretation by the courts. It includes considerations of a public policy and the interests of Justice. This term signifies that the process of the court must be used bone fide and properly and must not be abused. The court will prevent the improper use of its machinery.

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[40] Again to refer to *O'Reilly v Mackman*, Lord Diplock further rationalised the approach with regard to the scope of O 53, at p 285:

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Now that those disadvantages to applicants have been removed and all remedies for infringements of rights protected by public law can be obtained upon an application for judicial review, as can also remedies for infringements of rights under private law if such infringements should also be involved, it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of O 53 for the protection of such authorities.

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My Lords, I have described this as a general rule; for though it may normally be appropriate to apply it by the summary process of striking out the action, there may be exceptions, particularly where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law, or where none of the parties objects to the adoption of the procedure by writ or originating summons. Whether there should be other exceptions should, in my view, at this stage in the development of procedural public law, be left to be decided on a case to case basis - a process that your Lordships will be continuing in the next case in which judgment is to be delivered.

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[41] This suit raises public law issues as it is a decision and action taken by the Prime Minister in pursuance of the provisions of the Federal Constitution that is being impugned. As such a decision taken by the Prime Minister with regard to a Minister as a member of the administration in his public duties is one which has implications for the public as a whole and it is in consequence of this that the public law is concerned with the decision making process. The legal sources of the powers that are being impugned are in the public domain. As such to institute the proceedings by ordinary summons, though seemingly appearing to be simple in procedure, will deprive the public authority in this case the Federal Government and in the circumstances of the present case, of the protection of the law that it is entitled to by the processes available under O 53.

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[42] It is reasonable to anticipate that had the trial judge not grant the application to strike out in favour of the respondents, the respondents would have lodged an appeal. Although the position would be hypothetical in the present circumstances, such an appeal would serve to illustrate further that this suit is ill founded. And the reason is better explained in the following passage in the case of *R v Entry Clearance Officer, Bombay, Ex p Amin* [1983] 2 AC 818 at p 829 per Lord Fraser of Tullybelton:

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Judicial review is not concerned with the merits of a decision but with the manner in which the decision was made.... Judicial review is different from an ordinary appeal. It is made effective by the court quashing an administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrator.

A [43] For the reasons elaborated above I have found that the suit is ill founded, constituting a misuse of the processes of court and therefore unsustainable. This appeal is dismissed with costs and the judgement of the trial judge is affirmed.

Appeal dismissed.

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Reported by Sivapragasam Kumaran

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